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IN THE

Supreme Court of the United States

October Term, 1927

NO. 16, ORIGINAL

THE STATE OF COLORADO,
Complainant,

vs.

THE STATE OF KANSAS and THE FINNEY COUNTY WATER USERS' ASSOCIATION,
a corporation,
Defendants.

PLAINTIFF'S BRIEF ON DEFENDANTS' MOTION TO DISMISS.

WILLIAM L. BOATRIGHT,
Attorney General of Colorado.

RALPH L. CARR,
Assistant Attorney General of Colorado.

JAMES GRAFTON ROGERS,
HENRY A. DUBBS,
FRED A. SABIN,
A. WATSON MCHENDRIE,
PLATT ROGERS,
HENRY C. VIDAL,
of Counsel.

Clark QUICK-PRINTING Co., Lawrence 1332-34 Denver, Colo.

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NO. 15, ORIGINAL

THE STATE OF COLORADO,
Complainant,

vs.

THE STATE OF KANSAS and THE FINNEY COUNTY WATER USERS' ASSOCIATION,
a corporation,
Defendants.

PLAINTIFF'S BRIEF ON DEFENDANTS' MOTION TO DISMISS.

PRELIMINARY STATEMENT.

The situation set forth in the Complaint is as searching and deeply founded as it is new in facts. It presents a problem of international law which could not arise except by the peculiar operation of the Federal Judiciary system. Moreover, it has not arisen before even in that system, and a diligent survey of the fifty cases between sovereign states as parties which have

been considered by the Supreme Court in the last one hundred and forty years reveals no comparable circumstances. The States of the United States are, except as limited by the express provisions of the Federal Constitution, independent sovereignties. As such, except where prohibited by the Constitution, they are entitled to maintain, and, indeed, affirmatively expected to maintain, their characters as independent nations. The Constitution and its framers contemplated that the states would preserve and cherish integrity of territory, unity of administration, local government, and the other qualities and activities of the modern sovereignty. Each was expected, and is now expected, to be the natural unit for all social organization, for political policy on domestic affairs, and for the creation, the protection, and the administration of property rights. Across this background the Constitution has written certain specific limitations. Three of these, and three only, materially influence our present problem. The states are forbidden to make war upon each other. The states are further forbidden to make agreements or compacts between each other except by permission of Congress. Finally, there is created a federal judiciary operating not only over and above the states in the form of a Supreme Court which can adjudicate between them, but also operating within their own territory upon their domestic affairs and upon their own citizens in the form of the district courts and circuit courts of appeal. In other words, these independent sovereignties are expected to maintain their character and existence, but the traditional weapons and means of adjustment and agreement between independent states, namely, war, diplomacy, and treaty, are forbidden them. Instead of these traditional means of communication, adjustment and agreement, there is substituted a new device. This device is the power of the United States Supreme Court to adjudicate controversies

between the States, coupled with an implied duty upon the part of the states to resort thereto when controversies arise. The power of compact with consent of Congress is so limited that, historically, it has been little used. The abolition of any ordinary necessity for diplomatic corps and diplomatic machinery, as well as the requirement of congressional consent to any important interstate agreements, has deprived the states not only of the old freedom in ordinary cases to adjust conflicts between themselves, but more subtly, of any familiar and available machinery for negotiation. As a consequence the power of adjudication in the Supreme Court is the one natural outlet and remedy for any conflict over jurisdiction, property or sovereignty which is serious enough and persistent enough to involve a political problem. For the first time in recent history, however, we find states creating diplomatic corps now to handle the problems of interstate streams.

The Constitution never contemplated that the operation of the lower Federal Courts would complicate the integrity of states or the exercise of their natural functions as the units of political action, social order, and the creators and administrators of rights to liberty and property. The power granted Congress to extend the jurisdiction of such subordinate Federal Courts as it might create to certain classes of cases was not intended to impinge upon the powers of the states but intended only to secure the enforcement of the Federal Constitution and laws by independent tribunals and to secure unprejudiced judicial protection for residents of or claimants under the laws of foreign states. The drafters of the Constitution were eloquent in the expression that the creation of subordinate Federal tribunals should never disturb state sovereignty. It is significant that this disturbance of state sovereignty and state integrity by the jurisdiction of the subordinate

Federal Courts should now for the first time in an original proceeding be arising in a single narrow field, namely, in connection with the question of water flowing from one state into another. The subject of interstate commerce which would occur to the mind of any planner of a Federal system as a natural source of such difficulty was removed from state jurisdiction by an express constitutional provision. The possibility of difficulty over large rivers used by commerce seems to have occurred to the founders of the government, as they transferred to the Federal power the control of navigable streams. The depletion of a stream was never imagined. The development of irrigation and the modern demands for water for large municipalities were not anticipated. Both problems have now arisen. In *Hudson County v. McCarter* (infra), and other less striking cases, the Supreme Court has already met the inevitable conflict over municipal water supplies on interstate streams brought about by modern metropolitan life. In *Kansas v. Colorado* (infra) and *Wyoming v. Colorado* (infra), the Court has already met the problem of state conflicts over water for agriculture in the great arid territory of the West. In both of these cases the Supreme Court has so far accorded with the words and spirit of the Constitution by treating these problems as those of international law, and predicated its discussion and decrees upon the idea that they were problems between states as such, at least when the states chose to raise the issue and treat them as such. Already still another field of discussion, namely, that of river control for flood prevention and river use for power development on non-navigable streams, both consequences of increasing population in the West, appears before Congress and will no doubt ultimately reach this Court. In all these cases so far both Congress and the Western States themselves seem desirous of treating the problems on the basis of state sovereignty and of recognizing

and maintaining the integrity and unity of the states. This again is in consonance with the political traditions of our people, with the need of preserving units of local action in so great a national territory, and in accord with the wording of the Constitution and the theory of its designers.

In the present controversy the State of Colorado complains in substance that in the field of irrigation the apparent jurisdiction of the subordinate Federal Courts threatens, indirectly but effectively, to infringe not only upon the independence and integrity of the state sovereignty but, even more strikingly, under the peculiar facts in this case, to impinge upon and disable the Supreme Court itself in the performance of its duty as an adjudicator between sovereign states. Colorado points out that in the normal performance of its functions as a sovereign and a unit of administration, it has developed an original legal theory for the use and control of the most vital wealth and resource in its development, namely, water. It points out that, step by step with this new legal conception of state ownership and control of water, it has developed an elaborate administrative system aimed at the most advanced and economic use of this resource, and it finally indicates that the infringement of this legal theory and the disruption of its complicated administrative system will, in its opinion, leave the state helpless and floundering in the problem of the care and use of the water of its streams. It tries to bring home to the Court a geographical condition and economic system which is unfamiliar to most of the members of the bar. It tries to make vivid the fact that within the borders of Colorado water is the limiting factor and controlling element in every formula and problem of development and civilization. It tries, temperately but earnestly, to make clear that the limits of its water supply are not merely the daily preoccupation of all its builders and citizens, but

that the utilization and administration of its water supply are the prime functions and activities of the state itself. Finally, the state points out that the Supreme Court, in *Kansas v. Colorado*, recognized these facts, adopted these theories, dwelt upon the historical and political development of these principles, and adjudicated as between the states a settlement of the controversy up to the time of that litigation. Colorado then sets out that by indirection but, notwithstanding, by the effective operation of its machinery, the subordinate Federal Court will, unless interfered with, destroy the state unity, disrupt the state administration, and obliterate the adjudication of this Court in the past and its power of effective action in the future.

The principles of domestic law and the rules of private litigation can furnish very little help or guidance in a situation as novel as this. The common law dealt with no such problems as these. They belong in the realm of international and constitutional traditions and not those of domestic tribunals. We are dealing with governments and sovereignties. The principles announced in courts of Common Pleas and King's Bench, with their furniture of writs and sheriffs, can aid us only by remote and dangerous analogy. It is not true, however, that, because of this, the problem can not be systematically discussed. It can be rationalized. There are traditions, precedents, and political conceptions which can be cited and applied within certain obvious limits. With these preliminary views in mind, we shall endeavor briefly to discuss the principles involved in this plea to the Supreme Court. To a considerable extent the Complaint itself—which is necessarily broad and unconventional in its form—supplies the main substance and argument in the case. Perhaps a somewhat more systematic development of the facts and principles therein set forth will aid the Court.

METHOD OF DISCUSSION.

This brief will take up the controversy under the following heads:

I. The contrasting water law of Colorado and Kansas.

II. The advanced administrative system affecting water rights in Colorado.

III. The economic and political principles involved in the development of the Colorado water system.

IV. The litigation in *Kansas v. Colorado*, what it included and what it settled.

V. The inapplicability of various decisions recognizing priorities regardless of state lines to the present controversy.

VI. The effect of adjudications between individuals (i. e., on the sovereignty, operations, administrative machinery, and economic security of the State of Colorado, and upon the previous adjudication in *Kansas v. Colorado.*).

VII. The technical propriety of this proceeding, and the remedy sought.

VIII. Conclusion.

I.

THE CONTRASTING WATER LAW OF COLORADO AND KANSAS.

The defendant's brief hinges upon and is devoted substantially to two arguments: (1) that the defendant Water Association has an appropriation; (2) that it is entitled to enforce this appropriation regardless of state lines, in spite of any policy or conditions in Colorado, and in spite of the adjudication of *Kansas v. Colorado*. If either of these points fail, the motion to dismiss fails.

a. The Kansas Water Theory.

The brief of the defendant spends much space on the discussion of the effect of the Kansas water statutes and the policy of Kansas legislation. While the brief goes into considerable detail, it does not suggest anything which was not elaborately briefed, elaborately argued and fully considered in *Kansas v. Colorado*. In that case, Kansas itself, through its Attorney-General and F. Dumont Smith, Esq., who now appears as counsel for Kansas and the principal counsel for the defendant Water Association, contended that she was a common-law state with the riparian doctrine in full force and that such irrigation as had developed was subordinate to, a part of and a mere minor consequence of the doctrine of riparian rights. They cited *Clark v. Allaman*, 71 Kansas 206, 80 Pac. 571, decided by the Supreme Court of Kansas in 1905, as authority for this view. The lawyers appearing for Colorado attacked this view to some extent but the Supreme Court followed the Kansas argument and held that Kansas did have the riparian doctrine and that the use of running water for irrigation in Kansas was a development of and feature of that riparian doctrine.

Kansas v. Colorado, 206 U. S. 46, 102, 104.

The fifth syllabus of the case (206 U. S. 47) shows that the official reporter interpreted the opinion as we do. The argument of the counsel for Kansas both in the original briefs and oral arguments and as abstracted in the official reports shows that this was the burden of their case. (206 U. S. 57-62; Printed Oral Argument 1906, pp. 51, 54, 210, etc.) The court sixteen years later distinguished *Kansas v. Colorado* from *Wyoming v. Colorado* partly on the ground that the controversy in the former was one between two states "one recognizing generally the common-law rule of riparian rights" and the other the doctrine of appropriation.

Wyoming v. Colorado, 259 U. S. 419, 464, 465.

Clark v. Allaman (supra) is still followed, approved, cited and recited by the Kansas Supreme Court in water cases—

A. T. & S. F. R. R. Co. v. Schriver, 101 Kas. 257; 166 Pac. 519 (1917).

And in its general doctrine—

Kirkpatrick v. Kirkpatrick, 112 Kas. 314; 211 Pac. 146, 152 (1922).

Bellport v. Harrison, 123 Kas. 310; 255 Pac. 52, 54 (1927).

Wright v. Jenks, 124 Kas. 604; 261 Pac. 840, 841 (Dec. 1927).

As the Kansas Supreme Court repeats recently, in citing *Clark v. Allaman*:

> "Generally speaking, the law is not like a costume, to be put on or taken off in conformity to the dictates of usage and custom."
>
> *Bellport v. Harrison*, 123 Kas. 310; 255 Pac. 52, 54.

As it might have said, Kansas had made her river bed and her citizens must lie in it.

It would now appear to be too late for Kansas and for its distinguished counsel who has appeared in both cases to argue as they do in present brief that the doctrine of appropriation applies in Kansas. Appropriation as recognized therein seems to be not the doctrine of the arid states but a somewhat liberal interpretation of the right of irrigation use under the riparian theory. Even if Kansas were now to suggest something new she should surely be committed in this court and against Colorado, if not elsewhere, to this view of her law.

(b) *The Colorado Water Theory.*

As to the legal theory in Colorado it is admitted that Colorado represents a most advanced example of the appropriation doctrine, applicable in its purest sense in the Rocky Mountain States. This is exactly what might be expected from the fact that while the rainfall is sufficient throughout most of Kansas to supply agriculture without irrigation, it is not sufficient in Colorado in any locality so to do. Whatever the conditions of climate might indicate, however, the law in Colorado to this extent needs no further citation.

Kansas v. Colorado, 206 U. S. 46, 55, 109;
Wyoming v. Colorado, 259 U. S. 419, 464, 465.

Colorado has, however, gone much further than the mere adoption of the appropriation doctrine. The complaint (pages 10 to 15) gives special reference to the constitutional provisions of the State and to some decisions of its courts as well as the general practice confirming the statement that the waters of the streams flowing in Colorado are deemed to be the property of the state in its sovereign capacity and that the rights of appropriation for irrigation or other purposes are

derivative or usufructuary licenses granted to individuals and exclusively for use within the state.

Colorado Constitution, Art. XVI, Secs. 5, 6, 7, 8;

Colorado Session Laws, 1917, 539, Secs. 1 and 2.

"In section 5 of article 16 of our state constitution as originally adopted, this public policy is thus tersely expressed: 'The water of every natural stream, not heretofore appropriated, within the state of Colorado, is hereby declared to be the property of the public, and the same is dedicated to the use of the people of the state, subject to appropriation as hereinafter provided.' Other sections of the same article make such provision. This language is both emphatic and clear. It is the voice of the people who ratified the constitution, and declares for all time the public policy of this state which theretofore had been recognized by all the departments of the dual governments. The statutes which were enacted by the earlier sessions of our general assembly to carry out the provisions of this section provide an elaborate and systematic scheme for the distribution of the waters of the state to those entitled to their use. The state has never relinquished its right of ownership and claim to the waters of our natural streams, though it has granted to its citizens, upon prescribed conditions, the right to the use of such waters for beneficial purposes and within its own boundaries. The property right, however, in the natural streams, and the waters flowing therein, has never been renounced or relinquished by the state, and it has at all times asserted not only its right of ownership, but the unrestrained right, within its own boundaries, to

distribute its waters to those who have, under its authority, acquired, by perfected appropriations, the right to their use.

"This constitution of ours was ratified and adopted by the legal voters of the state in accordance with the conditions prescribed by the enabling act of congress, and the president of the United States in his proclamation admitting Colorado into the Union found the fact to be that the fundamental conditions imposed by congress on the State of Colorado to entitle it to such admission had been complied with. Congress, in passing the enabling act, and the President, in issuing his proclamation, were aware of the existing physical conditions and of the topography and geography of the state. The federal government, by its law-making and executive bodies, knew that the natural streams of this state are, in fact, nonnavigable within its territorial limits, and practically all of them have their sources within its own boundaries, and that no stream of any importance whose source is without those boundaries, flows into or through this state. The entire volume of these streams is therefore made up of rains and snows that fall upon the surface of lands included within the exterior lines of this state and of springs which issue from the earth within the same area. Such being the peculiar conditions, the state was justified in asserting its ownership of all the natural streams within its boundaries. When Colorado was admitted into the Union with such a constitution, the federal government, through its law-making and executive departments, thereby recognized and confirmed such right of ownership as belonging to the state in its sovereign capacity. We therefore find it to be not only that our state constitution and pertinent statutes, but the de-

cisions of the courts and duly announced public policy, all are in accord on the proposition to which the federal government has, as we have just shown, given its consent that the waters of the natural streams of this state belong to the people, to the state, in its sovereign capacity, and that its right to their distribution and control within its borders is free from any interference by any other sovereignty."

* * * * *

"The right of congress to regulate and control navigable interstate streams and the jurisdiction of the Supreme Court of the United States to determine, in a controversy between two or more sovereign states over the waters of an interstate stream, whether they are reasonably exercising their inherent powers of sovereignty, are not overlooked or questioned by us; but these considerations do not, for the reasons above stated, affect or bear upon the right of ownership and control by Colorado of its own natural streams, and its power and authority to regulate the distribution of their waters, within its own territory, for beneficial purposes."

Stockman v. Leddy, 55 Colo. 24, 27, 129 Pac 220.

and only recently the same doctrine is restated.

"Curley's title or right to the use of water of the natural streams in the State of Colorado did not come from the United States, but from the State of Colorado, which is the owner in its sovereign capacity of the water of all of its regular streams, and it is only the right to the use of the water that it permits appropriators to acquire. The water itself of all our natural streams is in the State of Colorado."

Bowers v. McFadzean, ... Colo. ....., 257 Pac. 361, 363.

II.

THE ADVANCED ADMINISTRATIVE SYSTEM AFFECTING WATER RIGHTS IN COLORADO.

As a logical sequence Colorado has had no difficulty in adopting a unique degree of state control, state supervision, state administration and what practically amounts to state diversion and state-supervised use of waters of its running streams. The principal statutes covering this development are cited in the complaint (Complaint, pages 12 to 15). They constitute practically the whole of Chapter XXXV of the Compiled Laws of 1921. Chapters have been added (Session Laws 1923, Chapters 133, 134, 135, 189, 190, 191, 192, 193; Session Laws 1925, Chapters 119, 120, 121, 122, 123, 124, 175, 176, 177, 178, 179; Session Laws 1927, Chapters 117, 118, 119, 193). The sections cited aggregate more than 500, and every one contributes to and exemplifies the extreme degree to which state control of not merely the title, but the actual use of water has been carried in Colorado.

The formal statutes, however, give only an inkling of the extent to which the state actually participates in every detail of water use on the principal Colorado streams. On the Platte River and Arkansas River particularly, the demand for water has carried the necessity for state control to a point which we believe has never been reached in any other irrigation community. The general effect is pleaded in the complaint (Complaint, pages 10 to 19). The administrative system was commented upon by Judge Brewer as early as 1906 (Kansas v. Colorado, 206 U. S. 46, 106). Its real development is within twenty years.

The details of the system should be left to await proof, but the issues here require in the first instance some familiarity with their operation. The water offi-

cials physically control every headgate and every diversion. (Colorado, Comp. Laws, 1921, sections 1725, 1726, 1727, 1728, 1729, 1730, 1731, 1732, 1812, 1823 to 1839, etc.) The Arkansas River proper is divided into twelve districts, and the main river falls into five. (Comp. Laws 1921, sections 1851, 1860, 1864, 1911.) In each one of these districts a water commissioner is on duty day and night, supervising the administration of water. He is furnished by the State Engineer with a list of the water rights or so-called priorities within the stretch of river which he superintends. This list is so tabulated that for every given quantity of water entering his district from above he is expected to open a certain number of headgates to a certain extent if water is demanded and needed by each. This sounds in the first instance like a simple mathematical problem but as a matter of fact the junction of tributaries, the quantity of returned water becoming available in the stream at various periods of the year and in a varying degree in different sections, the relative location of ditches, rains, crops, and a score of other factors affecting the use of water make the tabulation and its use a product of long administrative experience and engineering experiment and observation. Varying degrees of moisture, rainfall, dry winds and floods upon the main stream or its tributaries keep the water commissioner almost constantly on the alert and hourly modifications of the distributions of water are made by each commissioner. The commissioner knows nothing about the priorities in the district above him, except by general information, nor of the priorities in the district below. His duty is confined to the obligation of seeing that when a certain quantity of water enters his district it is used in a practical way pursuant to the tabulations in his hands and the varying conditions, and that he permits a certain other given quantity to enter the district below. The districts are thus

administered as units. Any appropriator in the lower district who feels that he is not receiving an adequate amount of water makes a demand not upon any particular ditch in an upper district, but on his own water commissioner, and that water commissioner in turn demands water through the division engineer. (Colo. Comp. Laws, 1921, sec. 1839.) The division engineer then, if the demand is well founded, does not "cut" any particular ditch but requires an upper district to supply water as a whole. He and the water commissioner each within their spheres of action take cognizance of innumerable elements affecting the water supply and the requirements for water. Knowledge of large quantities of returned water, information of floods on tributaries and side streams which may arrive and affect the situation, guesses even at prospective rainfall or prospective melting conditions of snow brought about by sunshine, knowledge of contemporaneous river conditions which affect the quantiey of available returned water, loss from turning water into dry channels, knowledge of the use of the stream as conduit for reservoirs, of existing exchanges between ditches, are a few of a thousand factors that influence the action of the administrators. A mistake in judgment may waste a large quantity of water which is not needed when it arrives at the ditch which was short of water when the demand occurred. An overestimate of supply may cause a shortage for days ahead. A day or half a day is often consumed in the flow of water from one end of a single district to another. A week may be required to carry water through the division. A week will not measure the period during which the division engineer is required to forecast and exercise his discretion. All this elaborate machinery is aimed at the adaptation of the priority system to the extreme necessity of an arid country with a limited and varying stream supply. A disturbance of the system destroys

it. Except for such adaptation the priority system would not have survived frontier days. As all students recognize, it is wasteful in the extreme. Discretionary distribution looms in the future here as in the present in Europe.

Much of the novelty, the state socialism and the public functions of the irrigation system of Colorado are matter of oral proof and evidence of practice. The novelty of the irrigation law is indicated, however, in some of its simpler phases by cases and statutes. Dogmatic and therefore misleading as such authorities necessarily are, they show the originality and malleability of this field of vital law.

The early repudiation of the whole common law applicable to water is interestingly represented as early as 1872. Here we find the court, conscious that some new scheme must be adopted for irrigation uses in this thirsty land, fumbling at "necessity", "the law of nature", and "estoppel" to justify what has to be found lawful.

Yunker v. Nichols, 1 Colo. 551.

Gradually a new sort of property is sketched, a "water right" or "priority" or "appropriation". Contrary to any common law conception—as specifically to the Kansas cases—this doctrine permits the diversion of water beyond the valley of the stream, burdens the stream bed itself even over alien lands with the duty of carrying water privately owned, diverted and brought from elsewhere. These "water rights", though realty, are severable and transitory, unattached to any land or locality.

Oppenlander v. Left Hand Ditch Co., 18 Colo. 142 (1892), 31 Pac. 854.

Although realty in the nature of easements, they can be abandoned by mere intentional non-user and thus again the common-law is ignored and the whole continuance of the right, once acquired, made to depend on unwritten local facts. The usufruct is readily lost in a moment.

Arnold v. Roup, 61 Colo. 316; 157 Pac. 206 (1916).

These rights, so set at large, are now classified into a complexity of uses, all new conceptions. Diversion for storage, is made a separate class, junior in claim to diversion for immediate use.

Greeley and Loveland Irrigation Co. v. Huppe, 60 Colo. 535; 155 Pac. 386.

The sugar beet industry enters the state and the courts, faced with a new necessity, adapt the law and permit storage for a season under a right acquired for immediate use.

Seven Lakes Co. v. New Loveland, 40 Colo. 382, 93 Pac. 485.

The constitution classifies all rights into preferential classes as between manufacturing (power), irrigation and domestic uses, but the local conditions show that plan discouraging new projects and the courts limit the application of the Constitution.

Town of Sterling v. Pawnee Ditch, 42 Colo. 421; 94 Pac. 339.

Gradually a novel recording system ("adjudication") is evolved by slow statutory steps, based on districts or units of local use.

Sterling Irrigation Co. v. Downer, 19 Colo. 595; 36 Pac. 787.

Fort Lyon v. Arkansas Valley Co., 76 Colo 278; 230 Pac. 615.

Then the necessity of economic use writes a new condition, "water thrift" into every decree.

Comstock v. Larimer and Weld, 58 Colo. 186, 203; 145 Pac. 700.

Fort Collins Milling v. Larimer and Weld, 61 Colo. 45; 156 Pac. 140.

And the water officials, now an army, are armed with a new discretionary freedom for the public interest.

Comstock v. Fort Morgan, 60 Colo. 101; 151 Pac. 929.

The state elaborates a definite policy of state ownership, control and state responsibility to other sovereignties—

Session Laws of 1917, Chapter 151, p. 539.
Compiled Laws of 1921, Section 1618, 1619.
Stockman v. Leddy, 55 Colo. 24, 129 Pac. 220.
Lamson v. Vailes, 27 Colo. 201, 61 Pac. 231.
Session Laws of 1921, Chapters 242, 243, 245, 246.
Compiled Laws of 1921, Sections 1651, 1681.
Session Laws of 1923, Chapters 189, 190, 191, 192.
Session Laws of 1925, Chapters 175, 176, 177, 178, 179.
Session Laws of 1927, Chapters 118, 119, 193.

The foregoing review indicates clearly that there is nothing whatsoever in common between either the legal theory or the administrative conditions in Kansas and Colorado. The mere term "appropriation doctrine" scarcely suggests, much less describes, the Colorado system. It is in substance a system of state ownership of water with an elaborate machinery for parcelling out that water on the general basis of priority of utilization but actually with an extreme devotion to the principles

of economic use and social welfare. In Kansas irrigation is an incident to the prevailing system of riparian polity. There is no developed administrative machinery. Irrigation is confined to a little scattering of ditches in southwest Kansas of which the Water Association, defendant herein, is one. This group remains as a remnant only of spasmodic efforts at irrigation which has been discouraged by periods of plentiful rainfall and is marked by a long history of financial difficulty and lack of popular support. As Justice Brewer said in 1906 (Kansas v. Colorado, 113), "at one time there were some irrigation ditches in these western counties which promised to be valuable in supplying water and thus increasing the productiveness of the lands in the vicinity of the streams and it is true that those ditches have ceased to be of much value, the flow in them having largely diminished."

It thus appears that Kansas and its counsel were right in 1901 in contending that there was no similarity of conditions or doctrines in the two states. This contention was sustained by this Court. It is even more markedly true today that another generation of intensive irrigation law and administration in Colorado. This fact distinguishes the situation between Kansas and Colorado altogether from the situation in Wyoming v. Colorado and from the private western cases which have tended to recognize priorities as such, regardless of state lines. As between states with such divergent physical conditions, legal policies and administrative development the disregard of state lines would seem to us the gravest mistake. If Kansas is entitled to water for its group of irrigation ditches, that water should be exacted from Colorado as a whole. Colorado pleads earnestly that it is unnecessary and unstatesmanlike to require it both to surrender its water supply and forfeit its legal and administrative system.

III.

THE ECONOMIC AND POLITICAL PRINCIPLES IN THE COLORADO WATER SYSTEM.

In the course of contrasting conditions in Kansas and Colorado, we have already developed some description of the Colorado conditions and therefore necessarily of the theories lying behind those conditions. There is, however, a conscious economic and political philosophy involved in the Colorado system which deserves attention.

Colorado was admitted to the Union with the full functions, powers and opportunities of the original thirteen states (Kansas v. Colorado, 185 U. S. 125, 143). As such, it had the duty of describing its property rights, administering them and, so long as it preserved a republican form of government, it had and has freedom to divide its social machinery between private and individual functions as it sees fit. It could, if it chose, have made all transportation, for example, a function of the state itself. It could have made irrigation altogether a state activity and in the course thereof forbidden agriculture through irrigation, except by and through state officers. It could have abolished the inherited common-law conceptions of both real and personal property. It was a sovereignty and, except as limited by express provisions of the Federal Constitution, it controlled the lives, the movements, the property and the activity of its inhabitants. In the field of irrigation it has actually exercised almost the full freedom of this sovereign power. Its irrigation doctrine involves abandonment and negation of the principal traditions of the common law. It has established a policy of state ownership of flowing water in direct contrast to the common law conception It has obliterated the rights of riparians, made the use of water dependent in the first instance upon priority

of utilization in point of time and finally classified even these priority rights into domestic irrigation and manufacturing uses and again into direct use and indirect or storage use. It has invented a system of statutory adjudication binding upon its citizens and the individuals affected, which would be incomprehensible to the common law jurist. It considers its irrigation priorities real property and in the nature of temporary easements, but provides that these may be abandoned under circumstances unknown to the law of easements and that these rights though conveyable by deed are not subject to the statute of frauds. It has invented and qualified an army of engineers and water officials unknown before in history. In short it has used its sovereign power not merely to reform the law of water, but to exercise itself the real ownership and utilization of its water resources. All this is a product of its necessity, of the state's dependency for life and civilization upon the thin streams of liquid that arise within its borders. The other western states in their irrigation developments are only pale reflections of the Colorado history and system.

Another traditional principle is involved. The principle of local government and local administration is represented in this water system. The gradual evolution of an irrigation system from one or two statutory sections adopted at the first legislature to the complex modern aggregate is nearly all written in the terms of two movements: first, increasing local control and, second, the increasing application of physical science. Local control is represented by the irrigation districts, with local officers, locally paid, locally selected, locally trained and concerned wholly with the local division and supervision of the flowing streams. These officers are made the representatives of communities or districts in their dealings with other communities and districts, and local familiarity with conditions, and local loyalty, and their

responsibility to local influences all are part of the theory.

The last movement or element in the picture is that of modern science. Fifty years of stream study, stream measurement, meteorological forecast and agricultural science have combined together to produce a system which gets the maximum results from its water resources. This is no place to elaborate upon the details of these conditions. Their extent can perhaps only be realized by watching the daily operations of the irrigation officials in Colorado.

Any recognition of the individual claims to water in Kansas as against individual ditches in Colorado will be an obliteration of the unity built up by these three principles of American progress. Any recognition across state lines of the claims of individuals in Kansas against individuals as such in Colorado will be a negation and a practical destruction of the doctrine of state sovereignty, local government and the utilization of modern science as applied to the water resources of this new western community.

IV.

THE LITIGATION IN KANSAS v. COLORADO, WHAT IT INCLUDED AND WHAT IT SETTLED.

As appears in the complaint, the State of Kansas, in 1901, brought suit against the State of Colorado in regard to the flow of the Arkansas River, and after a preliminary opinion on motion to dismiss, the case went to proof and the action was concluded in May, 1907, by a long and important opinion of the Supreme Court.

Kansas v. Colorado, 185 U. S. 125; 206 U. S. 46.

One judge took no part in the discussion; eight of the judges agreed in the conclusion, and six in the opinion. There was no dissent. This opinion has been treated by both sovereignties up to the present hour as a settlement to its date of all controversies affecting the river between the two States and their inhabitants. So far as we know, the only dissent from that view has been represented by various efforts of individual ditches in Kansas, as recited in the complaint, to ignore that adjudication and that decree, and sue to enforce alleged individual priorities to water across the state line without regard to the sovereignties involved. If the original litigation, as we believe and have relied upon, settled the controversy to the year 1907, the whole argument of the defendants made in their brief in the Motion to Dismiss fails.

The origin of the case of Kansas v. Colorado is of more or less familiar Western history. It is well known that the case originated as the result of the demands of the small group of ditches in southwestern Kansas that their sovereignty should proceed actively to present their grievances against the Colorado ditches. The case, while in its general terms a suit in behalf of Kansas at large, was actually initiated and carried on by and in behalf of the colony of old ditches referred to above by Judge Brewer. (206 U. S. 103, 117.) It will be noted that a main part of the argument was carried for Kansas, aside from its Attorney General, by Mr. F. Dumont Smith, who now appears again for the same interests.

After the filing of the bill on May 20, 1901, Colorado filed a motion to dismiss, which was overruled April 7, 1902.

Kansas v. Colorado, 185 U. S. 125.

The bill as abstracted in that decision, as well as in the original full text, reveals that the complaint was made by Kansas only incidentally in her capacity as an individual proprietary owner but primarily, as the opinion states, "as representing and on behalf of her citizens" (p. 142), and the bill, the Court said, "seeks relief in respect of being deprived of the waters of the river accustomed to flow through and across the State, and the consequent destruction of the property of herself and of her citizens, and injury to their health and comfort." (Opinion, p. 142.) The Court points out that the complaint against Colorado is of "state action and not the action of state officers in abuse or excess of their powers." (Opinion, p. 142.) The Court points out that the case is substantially an international conflict in which each state asserts the right of self-preservation, that each state has dominion over all things within its territory, and that the action will be settled on the basis of international law applicable between sovereignties appearing each in the capacity of *parens patriae* as the representative of all its citizens and inhabitants and as the source of all property rights within its jurisdiction. The Court says:

> "The gravamen of the bill is that the State of Colorado, acting directly herself, as well as through private persons thereto licensed, is depriving and threatening to deprive the State of Kansas and its inhabitants of all the water heretofore accustomed to flow in the Arkansas River, through its channel on the surface and through a subterranean course, across the State of Kansas. * * * Injury, it is averred, is being, and would be, thereby inflicted on the State of Kansas as an individual only and on all the inhabitants of the state, and especially on the inhabitants of that part of the state lying in the Arkansas Valley. The injury is asserted to be threatened, and is

being wrought, in respect of lands located on the banks of the river; lands lying on the line of a subterranean flow; and lands lying some distance from the river, either above or below (sic) ground but dependent on the river for a supply of water."—(Opinion, pages 145-146.)

The Court suggested certain inquiries of fact and overruled the demurrer without prejudice. Kansas amended its bill by joining sixteen of the Colorado corporations, as large diverters of water from the Arkansas River within Colorado. The United States attempted to intervene, but was finally dismissed. From 1903 to 1906 was consumed in the taking of voluminous testimony. This testimony covered not only all the recorded facts in regard to the flow of the river, ranging from extracts from the earliest travelers such as Lieutenant Pike, to the most recent engineering data, but also recounted in detail the history of irrigation in both states, the names and location of all the ditches and other diverting structures, the dates of their births and in some cases of their deaths, the quantity of water used, and the acreage on which it was applied. Every demand for water in either state and every effort to employ it, and the effect of every enterprise will be found elaborately pictured in the voluminous printed testimony. There can be no doubt but that all the parties concerned, both States and the Court, believed they were adjudicating an international controversy whose decision would settle and include the derivative claims of all inhabitants and property holders in either State. On May 13, 1907, as above indicated, the Court, through Mr. Justice Brewer, himself a citizen of Kansas, held that Colorado was limited by equitable considerations to a reasonable exercise of her sovereignty in the creation of property rights and the use and exhaustion of the waters of the Arkansas River; that her claims to exhaustion of the flow of the river within her own boundaries could not be sustained, that

the activities of her citizens had resulted in substantial depletion of the flow in Kansas and material injury to Kansas irrigation enterprises, but that, in view of the relative needs and conditions in the two states, Colorado had not so far exceeded the equitable limitations on the exercise of her sovereignty.

Kansas v. Colorado, 206 U. S. 46.

Citations in detail to the testimony, arguments, and the opinion, directed at showing the extent to which the operation and irrigation rights of the citizens of both States were examined and considered, would be so voluminous as to be unprofitable here. There is scarcely a page of the testimony of the printed oral arguments or of the opinion which does not bear more or less on the fact that the Court was adjudicating the claims of the citizens of both States as well as the more or less nominal property rights of the sovereignties themselves. The injury to the irrigators in Kansas was pleaded, dwelt upon by Kansas and proven (206 U. S. 51, 52, 55, 57). As already noted, a number of Colorado ditches were made defendants, and actively participated and resisted. As already noted, the opinion specifically mentions the claims of and injury to the series of ditches in southwestern Kansas of which group the present Water Users' Association, defendant, is a member. (206 U. S. 113, 114, 117.)

At the conclusion of the case the Court dismissed the bill of Kansas, reserving jurisdiction, however, to re-open the litigation if subsequent diversions by Colorado should destroy the equitable apportionment of benefits between the two states. This permission to re-open was given to Kansas the sovereign, and to Kansas alone. In the words of the Court, "the decree will also dismiss the bill of the State of Kansas as against all the defendants, without prejudice to the right of the plaintiff to institute new proceedings whenever it shall

appear that through a material increase in the depletion of the waters of the Arkansas by Colorado, its corporations or citizens, the substantial interests of Kansas are being injured to the extent of destroying the equitable apportionment of benefits between the two states resulting from the flow of the river." (206 U. S. 117, 118.)

No reasonable or unprejudiced lawyer or layman can examine this litigation without being convinced that both states were representing and staking all their rights, all those of their citizens, and all the property claims within their borders. Such was the natural implication in the bill of complaint filed by Kansas and the treatment of the case by the Supreme Court as a conflict between sovereignties. (206 U. S. 97.) Such undoubtedly was the conception of all the parties concerned as to the issues presented and tried. If Kansas was not asserting and litigating the claims of its irrigators, what was she asserting and litigating? The property rights of the State of Kansas itself as an ordinary proprietor were negligible in quantity, and are so treated by the Court. (206 U. S. 98.) The actions of Colorado complained of were not to any appreciable degree the assertion of water use and water rights by the State in a proprietary capacity but were expressly stated as the operations of Colorado through its citizens and corporations engaged in the diversion and use of the waters of the river for irrigation and other beneficial purposes. (206 U. S. 52.) If these irrigation rights in Kansas and Colorado were not the source and subject of the litigation, and not bound thereby, who or what was bound? If Kansas had no right to represent and bind the property rights of its riparian owners who were irrigators, did it have any more right to assert or bind the property rights of its riparian land owners using water for older uses? Both classes of property were derived from the State, defined, administered, and reg-

ulated by it. Both indeed were, under Kansas' own theory, merely different forms of exercise of the riparian property conception. (206 U. S. 51, 52, 59.) If the claimants who now style themselves as appropriators were not bound and foreclosed by this decision to the date of its adjudication, there is no reason to think that the rights of the ordinary riparian land owners were concerned or bound. If neither of these classes were involved or adjudicated, we have left only the small proprietary claims of the two States themselves. These were small in relative quantity and, as already indicated, were neither much treated by the litigants or more than cursorily referred to by the Court. If only the proprietary rights of the State of Kansas were involved, there was no occasion for granting Kansas leave to reopen the case. If the litigation in Kansas v. Colorado did not determine and conclude the claims of all property owners and inhabitants of both States, it was as empty a legal farce as the law can be accused of having enacted.

The later adjudications of the Supreme Court upon the same subject, however, quite confirm our view. In Wyoming v. Colorado, for example, in 1922, Wyoming adopted the same theory as that represented in Kansas v. Colorado, and we find the Supreme Court interpreting Kansas v. Colorado (p. 646) as a proper precedent for the litigation between Wyoming and Colorado. In that litigation no use of water except under appropriations was in evidence. The States again assumed to act for their respective citizens and property owners, and the adjudication is in complete conformity with this theory. It actually parcels out the river between the two States not only for the benefit of their respective appropriators but with the needs and requirements of the appropriators as a guide and a consideration.

Wyoming v. Colorado, 259 U. S. 419, 464, passim.

If Kansas v. Colorado did not bind the citizens of each, then Wyoming v. Colorado is an equally negligible performance. We contend that the litigation in Kansas v. Colorado, if it represents anything at all, is a determination of the following facts and conclusions:

(1) That up to the date of the adjudication the diversions and use of water in Colorado, including all of the acts, rights and claims of all the corporations, citizens and public agencies within the State of Colorado, had not exceeded the lawful assertion of Colorado's sovereignty and right to control and use the river.

(2) That up to the date of that adjudication, although numbers of citizens of Kansas had been damaged in fact in various ways and particularly the groups of ditches in southwestern Kansas already referred to had been substantially damaged and perhaps destroyed, Kansas and its citizens had no grounds of legal action as the injury brought about by Colorado was within the scope of its property and natural rights.

(3) That inasmuch as Kansas had treated the matter as one of state concern, it would be so treated and the rights of the citizens and property owners of both states would be merged in, involved in, and concluded by, the proceedings by their respective sovereignties.

(4) That inasmuch as the decision was necessarily based upon the claims of the two States as a whole, and inasmuch as the effect of the decision was to allocate to Colorado at least a minimum quantity of water and a minimum quantity of control represented by the then existing extent of the diversions from and depletions of the river flow in Colorado, and inasmuch as the entire subject is justiciable only as between the States themselves, any future adjudication, negotiations or allocations between the two States must continue in the same form, namely, as between the sovereignties as a whole.

(5) That inasmuch as litigation between states can proceed only in the Supreme Court of the United States, none of these matters is within the jurisdiction of any other court.

(6) That to permit private litigation between claimants on opposite sides of the state boundary line would simply mean that the status already fixed by the Supreme Court as between the states themselves would be destroyed and the use of water in Colorado definitely approved in quantity by the Supreme Court as against Kansas claimants, could be frittered away and piecemeal vanish.

(7) The privilege granted specifically to the State of Kansas in the final decree to reopen the case was the natural and obvious result of the law of the case itself, and precludes the thought that any individual can bring suit to assert any claims controlled by the question determined between states. No such procedure is even mathematically possible.

V.

THE INAPPLICABILITY OF VARIOUS DECISIONS RECOGNIZING PRIORITIES REGARDLESS OF STATE LINES.

The defendants cite a number of adjudications in which the courts have permitted litigation between appropriators in different states and enforced the claims of the appropriators in a lower state against appropriators in an upper state on a stream flowing from the latter to the former. There are such decisions, and we recognize that they represent at least part of the law applicable to interstate streams. We shall not attempt to discuss all these cases in detail. They are all obviously decisions reached in order to permit a settlement of an awkward individual controversy

which might otherwise be hopelessly entangled in international relations. All assume the acquiescence of the sovereignties involved. None denies these sovereignties, or discusses the issues here presented. None involved controversies in which the laws of the respective states were brought into conflict. All but one are private litigation.

The case of *Wyoming v. Colorado*, (supra) not particularly relied upon by the defense but cited by them, is perhaps the most significant of these decisions. In this case Wyoming sued Colorado, as did Kansas, in behalf of all her citizens and property owners, but the crisis and cause of the suit was a threatened large single diversion from a comparatively small watershed in Colorado which diversion had not yet become fully operative. Mr. Justice Van Devanter, for the Court, in the course of the opinion, stated that the same general doctrines as were applied in *Kansas v. Colorado* respecting the rights of the two States to sue for and represent the derivative claims of their inhabitants controlled the situation. He pointed out, however, that, unlike the situation in *Kansas v. Colorado*, in which Kansas was a riparian state and Colorado asserted the appropriation doctrine, here both States were alike in doctrine, both Wyoming and Colorado having repudiated the whole riparian system. (259 U. S. 464, 465). He then said that, under these circumstances, the relative priorities in the two States would be a guide to their respective claims upon the river. He points out that the courts in several cases have protected priorities regardless of state lines. He goes no further, however, in his own argument and conclusion than to indicate that the relative priorities, that is to say, the dates and quantities of the actual irrigation development in the two States, should be a guide to an equitable allocation of the waters of the stream between the two States. The decree itself

is in no sense a recognition of priorities regardless of state lines. It does not designate or protect any individual appropriations; it does not, as the appropriation doctrine requires, decree that the water shall be applied to the various ditches in the order and amount of their relative construction and utilization of water, but, on the contrary, determines that Colorado shall permit to flow over the state line each year a given quantity of water measured in acre feet. Wyoming is held bound to develop reservoirs and other irrigation projects—a state activity and not a priority conception. The distribution of this water in Wyoming is left to the Wyoming law and the Wyoming machinery. The question of what claims in Colorado may be affected or negatived by the operation of the decree is left to the laws and machinery of Colorado to determine and enforce. The controversy is treated as one between states. The allocation of rights is made as one between states. The relative priorities are referred to only for the purpose of indicating a system of adjudging the equitable claims of the two States as a whole upon the flow of the river. In short, the decision is in complete accord with the opinion and conclusion in Kansas v. Colorado except that it inserts one additional idea into the formula, namely, that where both states have committed their streams to a policy of utilization based on priority in time, that same priority or utilization in point of time may be considered as a guide towards the allocation and delimitation of their respective sovereign rights in the flow of the stream. There is not the slightest tendency in the case to infringe upon the sovereignties of either state or to make war upon their domestic theories and policies.

The other decisions cited by counsel in our judgment have little application to the case at bar. In the first place, none of them involves a situation such as

that upon the Arkansas River in which a prior adjudication between the states has committed both states to a doctrine of adjudication between the states as a whole. In none of them has there been any compact or legal adjustment between the two states as such. In none of them has there been any long-fought litigation such as has occurred in the Arkansas River which has led to or even approached a settlement and determination of the relative rights on the two sides. In the second place, not only is the element of a prior adjudication lacking, but the states themselves were not at any time impleaded in these cases. The cases are simply instances of private litigation involving no state conflict. In the third place, in none of those cases was there involved elaborate state policy, state unity, state sovereignty and state control such as now appears for the first time asserted by Colorado in this court. Fourthly, in none of these cases of individual litigation has there existed in either state the elaborate and complicated economic system now in effect on the Arkansas River. In all of them the conflicts were local, on local streams, confined to small quantities of flow, small acreages, and limited geographical areas. The situation on the Arkansas River is almost unique in the extraordinary length of the stream, in the immense geographical area involved, in the high development of administrative machinery in Colorado, in the acuteness of utilization, and the intensity of scientific control to which Colorado has developed its system of water distribution. Fifthly, in none of these private cases was there any conflict between the laws of the respective states under which the claimants deraigned their titles, nor was there any necessity for the trial court to determine the rights of the states themselves or to adjust basic questions concerning the extent of the exercise of their sovereignties. Finally, we respectfully suggest, since the decision of most of these cases, the sovereignties of the Western States are awake to their

political responsibilities and the dangers to their unity involved in the elimination of state lines. As shown in the complaint, the West is alive with a desire to treat the problem of interstate streams by the means of state compacts and on the basis of the States as units. For the first time the threat of important development on the Colorado, the Platte, the Arkansas, and numerous other streams has awakened all the States concerned. They now have diplomatic corps, they are negotiating as independent sovereignties, and they are struggling on the floors of Congress itself to protect and maintain the control of their natural resources. All of this is a new development in the scene of western irrigation law. It is an awakening to political and social realities which were forgotten in the haphazard days represented by these first fumbling treatments of water rights on interstate streams.

It will be noted that the rule in *Kansas v. Colorado* was laid down with most of the private cases ignoring state lines already decided at that date, and cited in briefs. The argument that these cases can overcome *Kansas v. Colorado* or that individuals can proceed under them in spite of an adjudication between their states applies, of course, also to interstate compacts. Compacts become futile also, if this argument is followed.

VI.

EFFECT OF ADJUDICATIONS BETWEEN INDIVIDUALS.

If the foregoing description of the legal policy, the administrative system and the economic conditions in Colorado, and the foregoing statement of the content and effect of the adjudication of the Supreme Court in Kansas v. Colorado are correct, it would follow that Colorado is entitled to take the following positions:

(a) *States necessary suitors.* That the litigation in Kansas v. Colorado committed both the sovereign States of Kansas and Colorado and the treatment of their respective claims to the flow of the Arkansas River on the basis of the States as units; that Kansas is estopped both by the doctrines asserted in that suit and by the very fact of commencing the suit from instigating, permitting or even justifying litigation between indivduals who derived their rights from her; that Colorado not only, by the effect of that suit but by her settled legal and political policy in respect of waters, is equally committed to the same attitude.

If the adjudication in *Kansas v. Colorado* has any of the traditional significance of either ordinary domestic litigation or of the international treaties which the adjudication in the Supreme Court was intended to replace, it has resulted in the determination of certain principles governing the rights of the two States. Each State assumed the position and now is to be treated as the responsible parent, source, and origin of all property rights in water within its borders, and the directing authority for the administration and exercise of those rights and the utilization of water in pursuance thereof. Kansas asserted Colorado's responsibility for the situation, and Colorado admitted and justified that responsibility. The property rights of private individuals and the activities of private individuals were treated as being controlled by and as being purely derivative from and subject to the usual respective sovereignties. There was no suggestion by either side that the States were not the sources of and in control of the situation.

(b) *Prior Adjudication.* That the litigation in *Kansas v. Colorado* resulted in an adjudication to the effect that the extent of Colorado's use of the water and the diversions and depletions connected therewith were valid to the date of that litigation. If the Supreme

Court in its international capacity is in any respect a court and not a mere temporary pacifier, these consequences would seem necessarily to follow. The adjudication therefore amounted to a finding that Colorado as a whole was entitled to use the river and to deplete it in the course of its domestic policy to the extent that such depletion and utilization had been carried to the year 1907 (or whatever proper date is judicially applicable to such a judgment), and she was in effect quieted in her possession and use of the water to that extent. This is the undoubted effect of the dismissal of a suit in equity according to the ordinary rules applicable to equity litigation, and it is accentuated by the express statement of the Court that the dismissal was subject only to the freedom left the State of Kansas to re-open the cause if and when she felt new facts subsequent in time had materially altered her situation. It would seem, therefore, that Colorado was entitled to rely upon that decision as an interstate settlement permanent in degree, and that she could thereafter continue within her borders to use as she saw fit the quantum of water available to her and to divide and license it among her farmers and citizens. She has undoubtedly relied upon this situation; the decree is now more than twenty years old.

If, therefore, Colorado was adjudicated this quantum of water or quantum of freedom, and left to dispose or modify the disposition of her own resources within these limits, any subsequent modification of or additions to or subtractions from such quantum would seem necessarily to involve the two States in their sovereign capacities. Surely, in the absence of Colorado, Kansas could not, by suing private individuals in Colorado, justly or effectually alter the old adjudication; surely private individuals as between themselves in the two States could not assume to alter or modify what belonged not to them but to their sovereignties.

Either State may, even now by the exercise of its sovereignty, whether by eminent domain or within the police power, substantially re-cast its whole system of internal rights. Not only the freedom to do that would be destroyed by private litigation but the exercise of the rights allocated to Colorado would be affected by such private litigation. Colorado is in a sense the trustee of a fund towards which its citizens stand as beneficiaries, and Kansas also bears some such analogy to its subordinate property holders. Litigation between the beneficiaries cannot, in domestic law, affect the fund without the presence of the trustees, nor has one beneficiary of the fund a claim against the beneficiary of another fund, though each, through their trustees, may derive benefits from proper litigation between the trustees. Such rules are familiar and necessary principles of any orderly law.

(c) *State ownership in Colorado.* That Colorado has by proper domestic policy made its water essentially a subject of State ownership and State administration, and the property rights which it has created are derivative and usufructuary only. To use a common law analogy, Colorado owns the fee. Her inhabitants are licensees of rights transient in nature, easily abandoned, even somewhat discretionary in application. If this is the domestic policy of Colorado, born of her own necessities and developed through a series of crises in her own history, Colorado is entitled, even had there been no previous litigation, to insist upon being impleaded whenever the use of the waters of the Arkansas River is concerned.

(d) *State administration in Colorado.* That Colorado has developed a legal system and administrative procedure which is a unit in itself. This machinery is delicate, complex, and interwoven with elements of discretion, engineering, and modern science. It consists of

groups of units called districts which, in actual operation, concern other units or districts, and the elementary conceptions of the appropriation doctrine are subordinated to this machinery. The destruction of these units by inserting either individual responsiblities and adjudications across district lines or across state lines, or by inserting arbitrary judicial rulings regardless of district lines or state lines, or of writing across the face of the statutes new interrelations not contemplated by the system, or thrusting into the regiment of its officers a new and foreign group of court marshals or commissioners would be each destructive of this system. With the system would fall not merely the sovereignty and integrity of the State and its policy, but also the economic and efficient use of its waters, the fruits of its experience in water administration, and the added value to a limited water supply which science, experience, and system can contribute.

(e) *Colorado policy of State responsibility.* That Colorado, furthermore, is by legislation and judicial decision definitely committed to a policy whereby it alone assumes responsibility and leadership in the control of its water resources, whereby it expressly forbids the recognition by any individual or officer of rights or claims outside its boundaries, and whereby it insists that its relations with neighboring states should be treated as matters between sovereignties. This conception of the obligations and policy of the State is in thorough accord not only with the traditional views of Anglo-Saxon government, not only with the conception of the uses and activities of states in the Federal Constitution, but most noticeably with the developed views of the other Western States. Whatever may be the situation in the smaller and crowded communities East of the Alleghenies, this Court is conscious that the Western States are social units, awake to the value and

usages of state rights, and eager to deal among themselves as the representatives of their peoples.

Will private litigation militate against any or all of the foregoing legal conclusions and policies? The Complaint, in paragraph fifteenth and elsewhere, tries to point out some of the consequences of such private litigation. In the pending cases in the United States District Court for Colorado the defendant has selected in one case seventeen and in the other about one hundred and twenty individual priorities for attack. There are more than four thousand such priorities adjudicated on the water system of the Arkansas River. (Complaint, supra.) The small percentage selected for attack are scattered through numerous water districts, numerous counties, located in different climatic zones, and so widely separated geographically that they have no mutual contact and little mutual consciousness. The owners of water priorities on the Arkansas River seldom have any relations with other priorities except within their own water district and with their own water commissioner. They know in the vaguest way only of what priorities exist outside their district, and even of the water supply of other districts. They know practically nothing contemporaneously of the diversions and river conditions existing from day to day in other districts. Occasional suits seeking permanent, not administrative, readjustments are the only exception. The adjudication of the United States District Court, for example, that the city of La Veta, located on a tributary of the Arkansas River one hundred miles from the main river and three hundred miles from the plaintiff in Kansas, should recognize the priority in Kansas would be either meaningless and ignored, or else throw the whole administrative system into a state of virtual paralysis. The city of La Veta has no idea whatsoever of what water is entering Kansas to-day, and if it closed its own head-

gates this morning the chances are that the effect would not be measurable twenty miles below, much less measurable at the state line. If a definite quantity of water must be supplied in Kansas, it can be supplied only by the unity and organized effort of the Colorado water officials, with each unit called upon to contribute its share, and to transmit the share received from above. The combined observations of the daily alterations and climatic conditions and stream flows from a watershed larger than many whole states must be compiled for a single brain and the effect of any action imagined and forecasted from day to day. Undoubtedly the United States courts or, indeed, any court can paralyze this system. No court can make it effective. No court can do anything else than destroy the control of the State and waste the water resources of a river upon which some 200,000 people are directly dependent. No court can do anything in the premises without considering, or adjudicating without consideration, the rights and policies of the State itself and the future guaranteed to it by the litigation in *Kansas v. Colorado.*

VII.

TECHNICAL PROPRIETY OF THIS PROCEEDING AND REMEDY SOUGHT.

As indicated at the opening of the brief, few analogies would be anticipated in the field of domestic law useful in connection with an interstate situation like the present, arising only because of the effect of the Federal judicial system. In one or two river cases the Supreme Court has discussed and confirmed the position taken by Colorado in this case, to the effect that it is entitled to dictate its own domestic policy in regard to property rights and to control its own natural resources. None of these cases, however, approach the particular

problem as closely as *Kansas v. Colorado* and *Wyoming v. Colorado*, already cited, but several of them deserve mention.

In *Hudson County v. McCarter*, 209 U. S. 349, in 1908, the Supreme Court upholds a New Jersey statute (copied in Colorado) forbidding the exportation of water from the State of New Jersey to other states, and elaborates on the principle and extent of state control of its natural resources.

In *Trenton v. New Jersey*, 262 U. S. 182; *Newark v. New Jersey*, 262 U. S. 192 (see the same subject in the lower courts, 10 Fed. (2d) 519, 526); the Supreme Court again adverts to the power of a state to control its water supply, divert it as it sees fit, delegate the right to other governmental agencies, and limit or destroy those agencies as it sees fit.

In *Foster v. Neilson*, 2 Pet. 253 (1829), the Court points out that on a question of sovereignty the domestic courts of a government should follow that government's contention as to its policy, and that they are not concerned with the political theory or domestic practice of a sovereignty. The lower Federal Courts are purely domestic courts, at least where jurisdiction rests upon diversity of citizenship, as in our cases.

In *Luther v. Borden*, 7 How. 1, the Supreme Court, on similar issues, declares that the Federal Court should follow the state courts on internal political issues.

In *Snyder v. the Colorado Gold Dredging Co.*, 181 Fed. 62, 65, Justice Van Devanter as Circuit Judge comments on the right of the state to develop its own legal water system.

Besides *Kansas v. Colorado* and *Wyoming v. Colorado*, there are several cases in the United States Su-

preme Court in which the states themselves have come into collision regarding the use of interstate streams.

In *Missouri v. Illinois*, 180 U. S. 208; 200 U. S. 496, concluded in 1906, Missouri sued Illinois and a municipal sanitary district, alleging that the defendant state was polluting the waters of the Mississippi River. The case was brought on the theory that Missouri was threatened by governmental activity in Illinois, which is the responsibility and theory accepted by Colorado in the present litigation. Missouri was permitted to sue in order to protect the general welfare of its citizens. The injunction was denied, and Chicago permitted to continue its operations on the merits.

In *Tennessee v. Arkansas*, 249 U. S. 588 (1919), Tennessee sued Arkansas to prevent levee improvements which resulted in flooding lands in the plaintiff state. The bill was dismissed for want of equity, on the ground, however, that the incidental damage arising from river improvements of this sort was *damnum absque injuria*.

In *North Dakota v. Minnesota*, 263 U. S. 365, the plaintiff state sued to enjoin a system of drainage districts constructed by the authority of the defendant state on an interstate river. The Court holds that where a state by changing drainage increases the flow of an interstate stream beyond its natural capacity so as to flood farms in another state, the latter has an interest as a sovereign or quasi-sovereign in the comfort, health and prosperity of its citizens, and may procure relief by injunction.

In *Wisconsin v. Illinois*, 270 U. S. 634, 271 U. S. 650, and *New York v. Illinois*, both of which cases seem to be still pending, the plaintiff States sued the defendant Illinois and the Chicago Sanitary District to enjoin diversions of water from Lake Michigan which threatened to affect the water level of the Great Lakes and the

flow of the St. Lawrence River. The right to sue in both these cases seems to be recognized, but the cases have not yet reached a conclusion.

The other cases on original jurisdiction have considerable collateral bearing.

In *Georgia v. Tennessee Copper Co.*, 206 U. S. 230, Georgia was permitted to sue on behalf of its general welfare to enjoin the discharge of noxious copper fumes across the state lines, thus protecting the injury of its forests and possibly of the health of its inhabitants. The Court remarks that the state property involved is a mere make-weight, and the essential issues are those of general public welfare.

In *Pennsylvania v. West Virginia* and *Ohio v. West Virginia*, 262 U. S. 553, and 263 U. S. 350, West Virginia and its officers were enjoined from enforcing an act limiting the export of natural gas which was already established in interstate commerce. The case, while decided by a divided court and arising principally on elements of interstate commerce, permits the plaintiff state, in the protection of its general social and business activities, to enjoin the activities of another state which threatened the general welfare.

The Supreme Court seems (since its first timid beginnings) to have considered that its judgments entered in suits between states were binding adjudications, as they naturally would be if entered in the exercise of the judicial power.

Virginia v. West Virginia, 206 U. S. 290; 246 U. S. 565, 591 ff.

Gordon v. United States, 117 U. S. 696.

Proceedings of the American Society for Judicial Settlement of International Disputes (1915), page 47 following.

Litigation between sovereignties as to the extent of their jurisdiction binds each state and all derived property.

Oklahoma v. Texas, 256 U. S. 70, 85.

The foregoing cases represent the general character of the previous litigation between states on subject-matters similar to our own and the general doctrines arrived at.

The present case is brought against the State of Kansas and a citizen thereof to enjoin the prosecution by that citizen or other citizens of Kansas of litigation which we consider in effect litigation against the State of Colorado or at least destructive of its sovereignty and inconsistent with its adjudicated rights. While the analogies of domestic law are somewhat limited in a controversy of this scope and character, a few familiar doctrines may be cited.

(a) The suit between individuals complained of, pending in the United States Court of Colorado, or similar suits which will certainly arise if these are permitted to continue, are substantially suits against the State of Colorado. As already outlined, the rights of the State of Colorado are substantially affected, and a decree entered in behalf of that Colorado will be infringed. The acts complained of are actually state acts, and suits of private individuals against a state are, of course, forbidden. While, under the doctrines of a number of cases, state officials can be sued where they are acting in excess of authority or under unconstitutional laws (for example, Ex parte Young, 209 U. S. 123), these cases should be carefully distinguished from the instances in which suits are brought against officials who are acting under the lawful authority of their sovereignties. State officers

cannot be sued nor their operations enjoined where they simply obey the state's command.

Louisiana v. Jumel, 107 U. S. 711;
Hagood v. Southern, 117 U. S. 52, 69;
Madrazo v. Georgia, 1 Pet. 110, 7 Pet. 627;
Harkrader v. Wadley, 172 U. S. 148, 169;
Pennoyer v. McConnaughy, 140 U. S. 1.

There can be no claim that the acts of Colorado, its legislation or its policies, aimed at confining its water within its own boundaries, are unconstitutional. No provision of the Federal Constitution forbids anything of the sort. The limitations that lie upon Colorado are equitable limitations arising out of international law and the natural relationship of states not positive or even constitutional in character. As between separate sovereignties such, for example, as Great Britain or France, these limitations are not recognized by domestic tribunals until or unless they are embodied in treaties or agreements. They then become part of the domestic law. As between states in the United States, the obligations between them in respect to the utilization of their natural resources are settled either by compact with the permission of Congress or by adjudication of this tribunal, the Supreme Court. It would seem to follow, therefore, that the acts of the officers of a state in pursuance of such domestic policies are lawful and in every respect entitled to credit by every domestic tribunal, and the lower Federal Courts among them, as the valid and effective proceedings of a sovereign. Only in this Court can a State be held to account. Only in this Court, as, for example, in Pennsylvania v. West Virginia, supra, can the officers of a state be enjoined from operations in which their sovereignty is actually the moving force. We have already indicated that the acts complained of on the Arkansas are state acts, performed by officers of the State, and for which responsibility is assumed by the

State. The situation was recognized by the fact that in the first litigation (Complaint, pages 27-28) the State officials were joined by the Kansas Ditch and afterwards by order of court dismissed in order that jurisdiction of the District Court might not be destroyed. In other words, even the District Court in that case recognized that the acts of the officers were in pursuance of a lawful State policy. It would seem to follow, therefore, that however indirectly the present claims of individuals in Kansas may be asserted, the plaintiffs therein are in effect complaining against the official action of Colorado, that the Colorado policy and administrative system is directly involved, and that Colorado itself is the actual and effective defendant.

The question of whether a suit is brought against a State will be determined not on the nominal parties but on the substantial interests and policies involved.

In re Ayers, 123 U. S. 443;
Ex parte New York, 256 U. S. 490, 500.

(b) *Analogies.* The ordinary analogies of private law would prevent a suit of the sort now sought to be enjoined if attempted to be brought. The States, if nothing more, are at least the trustees and repositories of their natural resources, entitled to administer, to defend and to protect those natural resources, and to distribute them to their citizens as they see fit. They are in a sense, therefore, the trustees of a fund. This is surely the result of the adjudication in *Kansas v. Colorado.* It is elemental law that the beneficiaries of an estate or trust fund will not be permitted to sue a stranger (as another trustee or, even more, the beneficiaries of another trustee), without the presence of the trustees themselves. Only the failure of the trustees to act will excuse such a proceeding. The reason is clear. Confusion, a mass of conflicting decisions, and the

destructiveness of the very idea of the difference between principle and derivative interests would follow.

Perry on Trusts and Trustees, 6th Ed. Sec. 877, 886.

"*Trusts*," 39 Cyc. 612.

If, as we deem it, the rights of citizens in both states are purely derivative, the same consequence would seem to follow. If Colorado and Kansas can, by the exercise of their sovereignties, destroy and re-distribute property between their inhabitants; if Colorado, as indicated, has created what amount only to transitory and usufructuary rights, most intangible and vague in quality, litigation between the holders of such derivative rights, and particularly litigation between the holders of one form of derivative right in Colorado and another form in riparian Kansas, would seem contrary to the whole policy of the law.

(c) *The remedy sought.* The Bill prays for an injunction or such other relief as may be appropriate. It is possible that either injunction, mandamus or prohibition might be employed as remedies if the present case were one of private litigation. If it be deemed that the District Court has no jurisdiction whatsoever because this is a suit against a State, prohibition would undoubtedly lie. If it be deemed, however, that while the District Court has jurisdiction because of the nominal appearance of the parties and the form of the suit, injunction would seem the more appropriate remedy. While we do not assume that the Supreme Court is primarily concerned with the division of common law remedies when operating in the broad realm of sovereign states, it should be pointed out that prohibition and mandamus are common law remedies which must rest upon common law doctrines. If the division between equity and law is to be maintained, this is properly a suit in

equity. It involves the consideration of the broadest sort of equitable principles. The doctrines of political policy, the wisdom of encouraging local government and administration, are not fields with which the common law is traditionally concerned. On the other hand, we see here, in the first place, a suit which is primarily based on a previous judgment in equity, namely, on Kansas v. Colorado. It was an equitable judgment, not cognizable or recognized by the law courts, and enforceable only in equity. Jurisdiction was even expressly reserved at the close. In the next place the rights of the individuals in both Kansas and Colorado are derivative in nature. They are beneficiaries, with indirect claims to the subject-matter litigated in *Kansas v. Colorado*. Furthermore, the relief sought here is not relief merely against the present litigation. It is relief against threatened similar litigation of the same character which will naturally and inevitably ensue if the United States District Court enters any injunctions or orders against the Colorado ditches. There are other ditches in Kansas which can and will sue. The relief sought is broader than anything contemplated under the old writs of prohibition or mandamus.

Equity has often been employed to protect the rights of a state under circumstances generally similar to this.

Georgia v. Brailsford, 2 Dallas, 402, 415;

Georgia v. Tennessee Copper Co., 206 U. S. 230.

This Court can mold its procedure and process to suit its needs.

Kentucky v. Dennison, 24 How. 66, 98.

(d) *Ancillary.* The present suit in its equitable character is essentially ancillary to the main litigation in

Kansas v. Colorado. In that decision jurisdiction was expressly reserved by the Supreme Court to consider the matter further when the proper circumstances arose. The present case amounts to a proceeding, supplementary or ancillary in nature, whereby the Supreme Court is asked to make effective its decree in the former case against a party whose privy, representative and grantor, namely, the State of Kansas, was directly named and involved. For all practical purposes it is a request that the Supreme Court extend the verbiage of the decree in the former case to cover a party bound thereby but who now repudiates the effect of that decree because not named therein. Such ancillary proceedings are the natural function and within the original jurisdiction of a court of equity.

Root v. Woolworth, 150 U. S. 401, 410;

Wilson v. Alexander, 276 Fed. 875 (1921);

Wabash Railroad v. Adelbert College, 208 U. S. 38;

Krippendorf v. Hyde, 110 U. S. 276, 280;

St. Louis & San Francisco R. R. Co. v. Byrnes, 24 Fed. (2d) 66 (1928);

Central Union Trust v. Anderson County, 268 U. S. 93;

Fletcher's Equity Pleading, Sec. 958 ff.

CONCLUSION.

The inevitable situation involved in the Bill of Complaint, the broad scope of the issues, and the question of the political and social consequences involved need no further elaboration. Our problem has been, as we have seen it, not to remind this Court of the legal and constitutional conceptions on which our case must rest, but to make vivid to it an unfamiliar situation in

the far West. Colorado has carried its irrigation development to a point which few American citizens have realized. A new field of social and economic problems has developed and, based on these considerations, new legal conceptions, new adminsitrative conditions, and a new and strange employment of science. Irrigation law is perhaps the most vivid example of a developing and shifting legal system available in America. To its evolution have been devoted funds, energies, and capacities which could only be enlisted by the stern requirements of a community in which water and the use of water is the controlling problem of human life. That picture this brief has attempted to draw. The consequences of the picture the Supreme Court is more competent to follow, more experienced to judge, than ourselves. We ask only that the citizens of Kansas should follow the proper remedy, assert their complaints through their State, submit themselves to the orderly administration of their own social units. She protests earnestly, and pleadingly against the destruction of her system, the waste of her water, and the repudiation of the long-fought litigation in *Kansas v. Colorado.*

Respectfully submitted,

WILLIAM L. BOATRIGHT,
Attorney General of Colorado.

RALPH L. CARR,
Assistant Attorney General of Colorado.

JAMES GRAFTON ROGERS,
HENRY A. DUBBS,
FRED A. SABIN,
A. WATSON MCHENDRIE,
PLATT ROGERS,
HENRY C. VIDAL,
of Counsel.